EMPLOYMENT TRIBUNALS

Claimant: Ms Lesley Taylor

First Respondent: Mane Limited

Second Respondent: Jonathan Gray

Heard at: London South Tribunal

On: **7th to 11th November 2022**
And 13th and 14th December 2022 (in Chambers)

Before: **Employment Judge Clarke**
Miss M Foster-Norman
Dr S Chako

Representation:
Claimant: Mr R Kohanzad (Counsel)
Respondent: Ms J Stone (Counsel)

RESERVED JUDGMENT ON LIABILITY

(1) The complaint of unfair dismissal is not well-founded. This means that the Claimant was not unfairly dismissed by the First Respondent.

(2) The complaint of direct age discrimination against both the First and Second Respondents is not well-founded. This means that the Claimant was not discriminated against by the either of the Respondents because of her age.

(3) The Claimant's claim for notice pay (wrongful dismissal) is dismissed on withdrawal.

REASONS

Introduction

1. The Claimant was born on 4th April 1949. The First Respondent is a UK subsidiary of a family-owned fragrance and flavour manufacturer headquartered in France. The Claimant was employed by the First Respondent as a Fragrance Accounts Manager from 28th August 2008 until her dismissal on 26th March 2020 at a time when she was very nearly 71 years of age. The Second Respondent is the First Respondent's managing director responsible for the UK business and was the Claimant's line manager throughout her employment and immediately prior to her dismissal.

2. The First Respondent employs approximately 35 people in Great Britain over more than 1 site.

3. The Claimant notified ACAS under the early conciliation procedure on 26th March 2020 of a claim against the First Respondent and on 30th March 2020 of a claim against the Second Respondent. The ACAS certificates were issued on 26th April 2020 and 30th April 2020 respectively.

4. By a claim received on 17th April 2020 the Claimant sought compensation for direct age discrimination contrary to sections 13, 39(2)(c) and 39(2)(d) of the Equality Act 2010 against both Respondents, and for unfair dismissal and for notice pay against the First Respondent alone. The Claimant subsequent withdrew her claim for notice pay on 8th November 2022.

5. The Respondent resists the claim denying that the Claimant was subject to any discrimination and asserting that she had been fairly dismissed on the grounds of performance/capability. It was not disputed that the claims for unfair dismissal and notice pay were brought in time, but the Respondent asserted that the discriminations claims were time barred.

6. The case was listed for a 5 day final hearing to deal with liability only. Accordingly, this judgment deals with merits only and does not touch upon remedy.

7. At the conclusion of the 5 listed days, there was insufficient time remaining for tribunal deliberations and judgment was reserved. The Tribunal sat in chambers on a further two days of deliberations on 13th and 14th December 2022.

Apology

8. There has a been a delay in producing this reserved judgment. The Tribunal apologies to the parties for this delay. The parties have been advised by separate letter as to the reasons for the delay.

The Issues

9. At the commencement of the hearing, a list of issues were agreed. The agreed list is appended to this judgment.

The Evidence

10. At the hearing, the Claimant was represented by Counsel, Mr Kohanzad and gave sworn evidence.

11. The First and Second Respondents were represented by Counsel, Ms Stone, who called sworn evidence from Ms Agnes Skipper, Mr Cyril Negrello and Mr Jonathan Gray.

12. The Tribunal was also referred to, and considered, witness statements from each witness who gave oral evidence.

13. The Tribunal considered a bundle of 887 pages and was assisted by an agreed case list and chronology. Throughout this judgment, text in bold within square brackets refer to the pages of the trial bundle.

The Submissions

14. The Tribunal also heard oral submissions from both Counsel and received both a written opening note, closing submissions and a bundle of authorities from the Respondents.

15. The Respondent's oral submissions were in line with and expanded upon, its written submissions. In addition, the Respondent highlighted some of the evidence and asserted that the Claimant's evidence could not be trusted because her own narrative contradicted itself, in places her evidence was inconsistent with other evidence, she was at time evasive in cross-examination, and she had shown herself at trial as someone who did not always tell the truth.

16. Mr Kohanzad, on behalf of the Claimant, did not take issue with the Respondent's summary of the law save that he contended that genuine belief and reasonable grounds were not the only factors to be taken into consideration in determining whether a capability decision was fair. He submitted that the Claimant had not come to lie but had done her best and that the Second Respondent was at times vague and equally guilty of a failure of recollection.

17. His other submissions were to the effect that all of the discriminatory acts complained of amounted to a series of continuing acts of discrimination and none were therefore time barred. His submissions as to the merits of the claim were to the effect that the Respondent's case was inherently implausible and its case on capability was divorced from reality: there was a clear agreement from the commencement of employment that the Claimant would be a remote worker and that the Claimant's performance was constant and the only variable was age.

Also, that the Respondent's position had hardened after the Claimant refused to retire or give a retirement date and the Claimant wasn't being performance managed but results managed.

Law:

Standard of Proof

18. The party who bears the burden of proving the claim, or any element of the claim, must do so on the balance of probabilities.

Direct Age Discrimination

19. S.13 of the Equality Act 2010 ("EA 2010") confers on employees the right not to be discriminated against on the grounds of age. Enforcement of that right is by way of complaint to the Tribunal under section 120 EA 2010.

20. The Claimant must show that she was subjected to less favourable treatment by the Respondent and that such less favourable treatment was because of her age.

21. Under section 5 EA 2010, the protected characteristic of age relates to a person of a particular age group.

22. In determining whether there has been less favourable treatment, there must be no material difference between the circumstances of the claimant and the comparator – s23(1) EA 2010. It is a question of fact and degree whether someone whose circumstances are not precisely the same can be an appropriate comparator - ***Hewage -v- Grampian Health Board [2021] UKSC 37***. The tribunal can consider a hypothetical comparator if there is no actual comparator, or as well as any actual comparator but it may be easier to consider "the reason why" the employer treated the Claimant the way it did and then consider whether it was less favourable treatment because of the protected characteristic – ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285*** and ***Aylott -v- Stockton on Tees Borough Council [2010] IRLR 994 (CA).***

23. S.136 EA 2010 sets out a two-stage burden of proof for claims brought under the Act which has been subject to clarification and guidance, in particular in ***Igen -v- Wong [2005] EWCA Civ 142; [2005] IRLR 25*8**:

    Stage 1: The prima facie case
    There must be primary facts from which the tribunal could decide, in the absence of any other explanation, that discrimination took place. It is not necessary that a tribunal would definitely find discrimination, only that reasonable tribunal properly concluding on the balance of probabilities could do so.
    The burden of proof is on the Claimant: ***Ayodele -v- (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA.; Royal Mail Group Ltd -v- Efobi [2021] UKSC 22*** and

the tribunal must take into account all of the evidence adduced (not only that of the Claimant) and any argument made by the Respondent (eg that a comparator is not truly comparable). The tribunal should not take into account any explanation for the treatment given by the Respondent.
A difference in status and treatment is not sufficient to shift the burden of proof – ***Madarassy -v- Nomura International plc [2007] ICR 867*** and there must also be something to suggest that any difference in treatment was due to the relevant characteristic – ***B -v- A [2010] IRLR 400***.

Stage 2: the burden shifts
The Respondent must prove that it did not discriminate against the Claimant by proving that the treatment was in no sense whatsoever because of the protected characteristic. Cogent evidence is expected to discharge the burden of proof.

24. In ***Hewage -v- Grampian Health Board [2021] UKSC 37*** the Supreme Court said of the burden of proof provisions that "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is on a position to make positive findings on the evidence one way or the other."

25. Provided that the protected characteristic had a significant influence on the outcome, discrimination is made out – ***Nagarajan -v- London Regional Transport [1999] IRLR 572, HL***.

26. The tribunal may draw inferences from the primary facts found, should consider not merely each separate incident but the global cumulative effect of the primary facts found and must be mindful that discrimination may be unconscious – ***King -v- The Great Britain-China Centre [1991] IRLR 513 (CA), Anya -v- University of Oxford [2001] IRLR 377 (CA)*** and ***Nagarajan -v- London Regional Transport [1999] IRLR 572, HL.***

27. Less favourable treatment is an objective test. The Tribunal should consider whether the reasonable employee would consider the treatment to be unfavourable. There is a neutral burden of proof in relation to this element.

28. There will be no discrimination on the basis of age if the Respondent can show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim – s13(2) EA 2010. The legitimate aim must be objectives of a public interest nature, not purely individual reasons particular to the employer's situation- ***Seldon -v- Clarkson Wright and Jakes [2012] ICR 716 (SC)***.

29. Placing pressure on a claimant to retire may be less favourable treatment but genuine attempts to discuss the possibility of retirement will not be if there is an adequate explanation ***Asif v London Borough of Newham ET Case No.3203251/10.***

30. Legitimate aims may include succession/workforce planning (including facilitating intergenerational opportunities) and avoiding the indignity of disciplinary proceedings to address poor performance but the aim must be

legitimate for the particular circumstances of the business concerned - ***Seldon -v- Clarkson Wright and Jakes [2012] ICR 716 (SC); Sharma v Lee t/a TMM ET Case No.3303400/13.***

Discrimination Time Limits

31. Time limits for claims for bringing a claim for age discrimination are set out in s.123 of the Equality Act 2010 ("EQ 2010"). The primary time limit is within 3 months of the discriminatory act, but this is extended by the ACAS early conciliation provisions – s140B EQ 2010.

32. Where the Claimant relies upon an omission rather than on a positive act of the Respondent, time runs from when the person decided not to do the act. In the absence of evidence to the contrary, someone is taken to decide on failure to do something when either they do an act which is inconsistent with them doing it or (if they do not do anything inconsistent) on the expiry of a period in which they might reasonably have been expected to do it – s.123(4) EQ 2010.

33. If more than one discriminatory action is claimed, the 3 month time-limit attaches to each action.

34. However, under s132(3) conduct extending over a period is treated as if done at the end of the period, so the 3 month time limit only needs to be counted from that point. This is often colloquially referred to as 'continuing discrimination'. In *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions, especially if different people are involved. This often means that a series of discriminatory actions can be in time provided the claim was brought within 3 months of the most recent action (ie the most recent action which is ultimately found to be discrimination).

35. The Tribunal also has a wide discretion to extend time if it is just and equitable to do so – s.123(1)(b) EQ 2010.

36. The burden is on the Claimant to show that it is just and equitable for an extension to be granted. There is no presumption that the discretion will be exercised, extensions are the exception rather than the rule – ***Robertson -v- Bexley Community Centre t/a Leisure Link [2003] IRLR 434 (CA)***.

37. When considering whether or not to exercise its discretion to grant an extension of time, the tribunal should have regard to the checklist in s.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation -v- Keeble & Others [1997] IRLR 336, EAT*). The tribunal should consider the prejudice each party will suffer according to the decision reached and all the circumstances of the case and in particular:
    (i) The length and reasons for the delay;

(ii) The extent to which the cogency of the evidence will be affected by the delay;
(iii) The extent to which the Respondent has co-operated with any requests for information;
(iv) The promptness with which the Claimant acted once s/he knew of the facts giving rise to the cause of action; and
(v) The steps taken by the Claimant to obtain appropriate advice once s/he knew of the possibility of taking action.

38. The potential merits of the claim may also be relevant to the exercise of the discretion: ***Rathakrishnan -v- Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT***.

Unfair Dismissal

39. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

40. The Claimant must show that he was dismissed by the Respondent under section 95 but in this case, the Respondent has admitted that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 26th March 2020. It is for the employer to show the reason, or principal reason, for dismissal.

41. Section 98 of the 1996 Act deals with the fairness of dismissals. There are 2 stages that the Tribunal must consider. Firstly, the Respondent employer must show that it had a potentially fair reason for the dismissal within section 98(2).

42. A potentially fair reason for dismissal under s.98 ERA is the employee's capability to perform work of the kind which he was employed by the employer to do. This is a very broad reason encompassing not only skills and aptitude but also health issues.

43. Secondly, having established the reason for the dismissal, if it was a potentially fair reason, as then Tribunal has found that it was, the Tribunal has to consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

44. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question of whether or not the dismissal was fair or unfair, having regard to the reason shown by the employer:
(a) depends upon whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
(b) shall be determined in accordance with equity and the substantial merits of the case.

45. There is a neutral burden of proof in relation to the general test of fairness.

46. There is also well-established guidance for Tribunals on the fairness within s.98(4) of misconduct dismissals in the decisions in ***British Home Stores -v- Burchell [1980] ICR 303*** and ***Post Office –v- Foley [2000] IRLR 827***. A similar analysis is also appropriate when considering performance issues in a capability dismissal. In summary, the Tribunal must consider whether:
    (i) the employer had reasonable grounds to believe that the employee was performing below what was required;
    (ii) the employer carried out a reasonable investigation into the matter to reach the conclusion that the employee was underperforming;
    (iv) the employer followed a reasonably fair procedure; and
    (v) was dismissal an appropriate outcome, rather than taking some other action, such as a demotion or redeployment.

47. A reasonably fair procedure will almost always, but not inevitably, involve notifying the employee as to where the deficiencies in their performance lie and what needs to be done to improve and then giving the employee a fair chance to reach the required standard – ***James -v- Waltham Holy Cross [1973] ICR 398***.

48. In considering all aspects of the case, including those set out above, and in deciding whether or not the employer acted reasonably or unreasonably within section 98(4) of the 1996 Act, the Tribunal must decide objectively whether the employer acted within the band of reasonable responses open to an employer in the circumstances. This applies not only to the decision to dismiss but to the procedure adopted by the Respondent – ***Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23; [2003] ICR 111, CA***.

49. The Tribunal need not decide whether the Claimant was in fact incapable – ***Taylor -v- Aldair [1978] ICR 445.***

50. It is also immaterial how the Tribunal would have handled events or what decisions the Tribunal would have made. The Tribunal must not substitute its own view for that of the reasonable employer – ***Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439***, ***Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23; [2003] ICR 111, CA***, and ***London Ambulance Service NHS Trust –v- Small [2009] IRLR 563***.

51. Procedural reasonableness is usually assessed by reference to the ACAS Code and unreasonable failure to follow the Code may result in an adjustment of compensation under S.207 and s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. In any event, the ACAS Code is be had regard to but is not a prescriptive list of actions which must be followed in all circumstances. The ACAS guidelines themselves specifically indicate that that the Tribunal may take the size and resources of the employer into account and that it may not be practical for all employers to take all of the steps set out in the Code.

52. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

53. Section 122(2) provides:

"Where the Tribunal considers that the conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

54. Section 123(6) provides:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

55. In determining whether any deduction should be applied to either part of the Claimant's award as a result of contributory fault, The Tribunal must first identify what conduct on the part of the Claimant could give rise to contributory fault. The Tribunal must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.

Relevant Findings of Fact and Associated Conclusions

The Witnesses

56. There was a significant amount of disagreement between the evidence given by the Claimant and the Second Respondent.

57. In general, where there was disagreement, the evidence of the Second Respondent was preferred by the Tribunal.

58. Although the Claimant gave evidence honestly and without deliberately trying to mislead the Tribunal, the Tribunal found her recollection was not always consistent, accurate, credible or reliable.

59. The Tribunal found the Second Respondent's evidence to be largely honest and straightforward, reliable and credible. He made admissions as to his own failings and admitted what he was unable to recall.

60. Ms Skipper's evidence was largely uncontentious, and the Tribunal had no concerns about her veracity. Mr Negrello gave evidence in a very controlled manner. His evidence was not considered by the Tribunal to be particularly probative of the issues.

The Claims

61. The Claimant commenced her employment with the First Respondent on 28th August 2008 when she was 59 years of age, having been recruited by the Second Respondent. At that time, and at all subsequent times, she lived in Staffordshire, approximately 185 miles from the First Respondent's office at Concord House, Haywards Heath.

62. Her written contract of employment [**155-173**] states that she is a Fragrance Account Manager and describes briefly describes her responsibilities and duties, as being at clause 4.1.1 to "use your best endeavours to promote the interests of the Company and devote such time as is necessary to carry out your duties in accordance with the needs of the Company and the job description…" , and at clause 4.1.2 that the Claimant shall "Comply with all reasonable directions and instructions of the Directors of the Company as may be required from time to time." [**159**].

63. The annexed job description [**173 – 174**] provided further details of her role. This included developing current target accounts, management of a number of customers and potential customers, maintaining and growing the company's position, gaining and keeping good client contacts, obtaining and winning new projects and co-ordinating projects internally and externally.

64. It specifically included the following: "Negotiating price & maintaining good supply relations" [**173**], "As the role involves a great deal of co-operative team work it is expected that when not visiting customers or travelling to & from such visits Accounts Managers will be in the Haywards Heath office" and "Produce accurate & timely claims for expenses" [**174**].

65. In evidence the Claimant accepted that the job description fairly and accurately reflected her role and the Tribunal found this to be so.

66. Under Clause 15.1.1 of the contract the Claimant was required to give the First Respondent 3 months notice in writing to terminate her employment [**167**].

67. Clause 6.1 of her contract [**160**] specified the Claimant's place of work as being "..at Concord House Haywards Heath or such other place as the Company may continue to trade from time to time." Clause 6.2 stated: "The Company may require you to work from any of its premises from time to time or at the premises of a Client/Customer depending upon the needs of the business."

68. The Claimant's remuneration package consisted of a basic salary plus an annual bonus which was paid on the basis of incremental sales as per Clause 7.5 at [**161**]. The Claimant was entitled to be reimbursed expenses necessarily incurred by her in the proper performance of her duties under Clause 8.1 of her contract provided that the Company had agreed to her incurring the expenses. Additional benefits provided included a company car (and all its running costs), health and life insurance and a pension.

69. The parties largely agreed that the terms of the Claimants employment contract were as stated in the written agreement. Where they disagreed was as to the Claimant's primary place of work. It was not in dispute between the parties that, throughout the duration of the Claimant's employment, she did not in fact attend the Haywards Heath Offices at all times when not attending clients/customers or the First Respondent's office in France but that she primarily worked from home outside such visits. She only attended the Haywards Health Offices infrequently, perhaps once or twice per month when she would usually attend for 2 consecutive days, staying locally overnight between those days.

70. The Claimant's evidence to the Tribunal was that she had told the Second Respondent during the recruitment process that she could not take the job unless she worked from home and that there had been a verbal agreement from the outset that Claimant would work remotely, coming into the office only when required for customer projects or internal meetings. The Respondents disagreed that there was any such parole agreement.

71. The Tribunal finds that the employment terms regarding the Claimant's place of work were as stated in the employment contract and job description. The requirement to attend the office when not visiting clients/customers or other offices was consistent with the team-work requirements that were a key part of the role. The Claimant was required to undergo a lot of travelling in the furtherance of her role (to customers in the North of England, elsewhere in the UK and abroad and to the First Respondents offices in France) and was provided with a company car in order to facilitate her travel. In that context, travelling to the Haywards Heath Office could not be seen as above and beyond expectation.

72. Further, the Claimant's own account (in her grievance [**404**] and her witness statement (**paragraph 16**)) was that she had requested that the terms of the written contract regarding her place of work be changed and that the Respondents had refused.

73. Nor did the Tribunal find that the Respondent's failure to take steps to discipline the Claimant for her failure to attend the Haywards Heath Office when not travelling elsewhere had thereby waived the Claimant's contractual requirement. The Tribunal found that her failure to attend the Haywards Heath Office was a matter of concern for the Respondents from early in her employment, but they initially chose to address this through encouragement to attend more regularly rather than any formal disciplinary action. The Second Respondent's evidence in this regard was corroborated by the Claimant's evaluation on 19th May 2011 [**176-177**] which noted that her failure to attend the Haywards Heath Office regularly created difficulties and encouraged her to attend more often.

74. Even if the Tribunal were wrong about this, pursuant to clauses 6.2 and 4.1.2 of her contract of employment, the First and/or Second Respondent could at any time have required the Claimant to work at the Haywards Health offices, provided that the request was reasonable, that is, for legitimate business purposes. The Tribunal finds that they did so on a number of occasions, including in the evaluation on 19th May 2011 [**177**], and by the Second Respondent repeatedly

telling the Claimant to attend the offices more often. This instruction was given regularly by the Second Respondent from at least May 2011 onwards in both evaluations and in formal and informal discussions. Regardless of the Claimant's view that it was unnecessary and unreasonable for her to attend more often due to the travel time from her home which attendance required, the Tribunal finds that such request was a reasonable one which the Claimant was contractually obliged to comply with. The request was not arbitrary but was based on the business needs of the First Respondent. Regular attendance at the Haywards Heath Office was necessary to facilitate the proper discharge of the Claimant's role through smelling, collaborative team-work and to promote inter-team relationships and effective communication.

75. Prior to the Claimant's employment by the First Respondent, she already had contacts at PZ Cussons, an account the First Respondent had a small amount of existing business with but was keen to develop. On commencing her employment, the Claimant developed these contacts and secured a substantial amount of new business with PZ Cussons. This client quickly became her primary account, and she devoted the majority of her time to managing it.

76. The Claimant asserted that there was a discrepancy between the number and type of accounts that she was given at the start of, and throughout her employment, by the First Respondent compared with other, younger colleagues. She complained that younger colleagues were given an advantage by being handed more active accounts whereas those which she was given were harder to develop. This was particularly important in the context of the assessment of the Claimant's performance and capability and the assessment of her bonus (which, as set out above, was based on the year-on-year increase in turnover generated).

77. The Tribunal accepted that it was harder to secure wholly new business than to service and expand existing business. However, the Tribunal did not accept that there was any less favourable treatment of the Claimant in this respect. A mixture of active and inactive (prospective) accounts were allocated to each of the employees according to their experience, availability and the business needs of the First Respondent at the point of allocation. Whilst there may have been discrepancies between the number of different active accounts given to each accounts manager, there was insufficient evidence presented to the Tribunal for the Tribunal to assess how many existing versus prospective new clients each accounts manager was allocated, or what the potential or actual value corresponding to each of those clients/prospective clients was or the ease with which new business was likely to be achieved from them.

78. Nor did the Tribunal find any evidence that, even if there was a material difference between the number and type of accounts given to the Claimant compared to other colleagues, the reason for any such difference was the Claimant's age.

79. Both the Claimant and the Second Respondent described how development of new business or new projects to fruition was often a medium to long term project

(1 to 2 years) and that a number of factors which could not be controlled by the Accounts Managers might influence sales figures at any given time. For example, the client's loss of shelf space in retail stores, changes in the client's management team and personnel, client decision making processes and choices, manufacturing delays and raw materials prices. In order to mitigate against matters outside of the control of an accounts manager and to ensure a continuous stream of new and existing business and consistent revenue from sales, the account managers need to proactively develop a pipeline of new and existing projects across a number of clients. The Claimant and Second Respondent also agreed as to the high importance of building and maintaining relationships with clients/customers.

80. During the first few years of the Claimant's employment and as she successfully developed her PZ Cussons contracts and brought in a significant amount of new business from them, concerns regarding the Claimant's performance were not substantial and her evaluations were generally positive (eg her evaluation of 19th May 2011 [**176 – 179**]).

81. Nevertheless, there were a number of concerns about the Claimant's performance which were raised orally with her, and which were of sufficient severity to be recorded in her evaluation. These were primarily about her level of attendance at the Haywards Heath Offices, her internal communication/record keeping, and the need to 'mine' as much business as possible from accounts where there were opportunities [eg **176 – 179**].

82. These concerns and an additional concern as to whether the Claimant was delivering what was required of her in a timely manner were subsequently raised repeatedly but intermittently and informally with the Claimant (see further below). They arose at least in part as a result of the Claimant's manner of working. The Claimant's preferred means of communication was oral: face-to-face, by telephone or latterly, during Teams video meetings. She committed relatively little to writing between herself and her colleagues and/or clients and although did she did use e-mail, she rarely followed up oral discussion with any form of written communication about what was discussed and she did not usually provide her regular reports to the Second Defendant in writing.

83. This manner of working meant that the majority of the time there were no clear or detailed records of the actions that the Claimant had taken/was taking. That in turn made it impossible for both the Respondents and the Tribunal to determine whether, when, or how, the Claimant was acting as there was little or no paper trail. Although the Tribunal was told that the Claimant took, and retained, her own notes of meetings and phonecalls in notebooks, none of these notes (nor any part of them) were available to the Tribunal and they had not been made available to the Respondents either during the course of her employment or in the course of the Tribunal proceedings.

84. Rather than attending the Haywards Heath office more frequently as a result of the concerns that were raised, it was the perception of the First Respondent that, as the years went by, the Claimant in fact attended less frequently, did not

proactively initiate meetings to discuss projects, did not advance plan in a timely and efficient manner and that her level and means of communication was problematic (eg **paragraph 9 & 10 of Miss Skipper's witness statement**).

85. At the time of her employment commenced, the law permitted employers to require their employees to retire at the statutory retirement age. Accordingly, clause 20 of the Claimant's employment contract stated: "*The company's normal retirement age is 65 for both men and women*." By the time of the relevant events described below, the law had changed in respect of compulsory retirement and employees could no longer be required to retire at statutory retirement age. Consequently, this term became impermissible and otiose. There is no suggestion by the Claimant that the Respondent sought to require her to retire in accordance with this express term.

86. Nevertheless, the Respondent's understanding, created by the express terms of the contract, was that the Claimant may be expecting to retire at age 65, namely around or after April 2014.

87. The Tribunal accepted the Respondents' evidence, which was to a large degree also supported by the Claimant, that the First Respondent's business was a specialist niche industry and that client relationships were an integral part of the operation of the business. Both of these matters meant that recruiting replacement Fragrance Account Managers was not a simple or quick process. The First Respondent would either have to recruit someone with relevant skills and experience, of which there was not a large pool of possible candidates, or someone who had transferable skills whom they could then train up (a process which would take some time).

88. The Tribunal found that the time required to effectively replace an employee such as the Claimant so as to minimise business interruption was likely to be somewhere between 6 months to 1 year in total (including any necessary training). Further, it would be preferable for there to be an overlap between the outgoing account manager and the incoming one to ease the transition with the clients.

89. Accordingly, as the Claimant's 65th birthday approached it was important for the Respondents to understand the Claimant's retirement intentions. This was to enable them to undertake appropriate business planning to recruit a replacement for her well in advance of her actual departure, which was necessary to avoid the interruption of long-term business relationship and a potentially significant adverse impact on the business.

90. Towards the end of 2013, approximately 5-6 months before the Claimant's 65th birthday, a conversation took place between the Claimant and the Second Respondent during which the Claimant's anticipated retirement was raised and the Second Respondent indicated that he wanted to plan for her successor to ensure a smooth transition. During this conversation the Claimant told the Second Respondent that she intended to retire at 65 because she felt she was expected to (as people generally did so at that age) [**394**] and perhaps also a

result of her contractual terms. The Second Respondent took this indicated intention to mean that she intended to retire sometime in 2014 but after April 2014 (her 65th birthday).

91. The Tribunal is satisfied that this was a legitimate and neutral enquiry which placed no pressure on the Claimant to retire and was necessary for reasonable workforce planning. There is no evidence that the Claimant was herself upset or felt pressurised to retire at the time of this conversation. Indeed, the Claimant herself described this, and later conversations with the Second Respondent regarding her retirement, as "not unpleasant" [**396**]. The Tribunal concludes that there was nothing detrimental or unfavourable to the Claimant arising from this conversation.

92. Following this conversation, and in anticipation of the Claimant's retirement, the First Respondent hired Reham Elwaki as an Account Manager, a process which took a number of months. Ms Elwaki was intended to be the Claimant's successor on the Claimant's retirement but required training as she had little or no experience in the fragrance business.

93. She commenced her employment with the First Respondent in September 2014, and worked closely with the Claimant, whom she shadowed. The Claimant took Ms Elwaki under her wing, trained her and took her to meetings with the customers whose accounts the Claimant managed, including PZ Cussons.

94. Unbeknownst to the Respondents, because the Claimant did not communicate it to them [**394**], the Claimant was in fact not desirous of retiring at that time. Had the Respondent's known that the Claimant did not intend to retire aged 65, they would not have recruited Ms Elwaki. Recruiting her required a huge investment of time and resources and the First Respondent's business was not in a position to support an additional Account Manager in the medium to longer term.

95. The Claimant did not retire as the Respondent's had expected and consequently other conversations about the Claimant's retirement took place between the Claimant and the Respondent between about September 2014 and 2016, with the Respondents seeking to ascertain her intentions. These were not pressurised or unpleasant conversations and the Claimant did not find them unpleasant [**396**]. At some point, the Claimant indicated that her intentions had changed, that did not intend to retire at age 65, but that she would retire at the end of March 2016, shortly before her 67th Birthday.

96. Although the Claimant denied that she had indicated this intention and said that she had only assured the Second Respondent that she would give 6 months notice of her intended retirement date (3 months more than her contract required), the Tribunal did not accept that her recollection in this regard was accurate. The Second Respondent's account is consistent with relatively contemporaneous documents [**200**] and the offer of 6 months notice is not similarly referred to. In particular, neither the Claimant's letter to the Second Respondent dated 18th March 2016 [**195**] nor her formal grievance of 2nd

December 2019 [**363-367**], nor the information that she gave in interview regarding her grievance [**392-406**] refers to it.

97. Things began to change in early 2016. By this time the Respondents' concerns about the Claimant's performance were increasing and in particular, the issues regarding her lack of effective communications with colleagues and her lack of clarity and leadership on projects. The Respondent began to address these matters more directly with the Claimant, both in person during 1:1 meetings and by e-mail (for example [**180-180**].)

98. The Claimant says that there was a conversation between herself and the Second Respondent at the East Midlands Raddison Blue hotel on 21st January 2016 in which the Second Respondent told her that she "*owed*" it to him to retire, that he had "*given her a job at 60*" when "*no-one else would have*" and that the Second Respondent told her she "*should go*". The Tribunal did not accept that this conversation took place as the Claimant described it or that the Second Respondent said the words that she attributed to him. There is no mention of this conversation in the letter which the Claimant wrote and sent to the Second Respondent at his home address on 18th March 2016 [**195-196**] which referred only to the Second Respondent having "*eluded to*" the Claimant's retirement plans and the Claimant elsewhere demonstrated her robustness and willingness to raise matters she was unhappy about or disagreed with. Further, the Tribunal did not form the view, based on its impressions of the Second Respondent during his oral evidence, that this is something the Second Respondent would have been likely to have said.

99. The Tribunal does find that in early 2016 the Claimant and Second Respondent had a further neutral conversation about her retirement. By this time the date that the Claimant had said she would retire (end of March 2016) was less than 3 months away and the Claimant had not given notice to terminate her employment. Further, it was clear to both the Claimant and the Respondents that the First Respondent could not justify continuing to employ the number of Accounts Managers that it then had. The Second Respondent had been asked about the Claimants plans in light of the cost of the increased headcount following Ms Elwaki's recruitment and told that he could not keep them all in the budget. It was therefore necessary to ascertain and clarify the Claimant's intentions regarding retirement.

100. In response to that conversation, and prompted by an issue regarding the replacement of her Company car, on 18th March 2016 the Claimant sent a letter to the Second Respondent at his home address which indicated in no uncertain terms that she had no intention to plans to retire and she planned to carry on [**195-196**]. The Tribunal is satisfied that the issue regarding the Company car arose as a result of the model of car requested by the Claimant and not as a result of her age or retirement plans. This was the first time the Claimant had expressed an open-ended intention not to retire.

101. This letter was sent to the Second Respondent immediately before he was absent from the office for 1 week. On his return he wrote to the Claimant by e-

mail dated 4th April 2016 [**198-199**] in which he stated: "*Firstly I would like to be very clear, as I have been previously, your decision to carry on working for foreseeable future as is your right is fully accepted*." It is clear from this correspondence that both the First and Second Respondents fully accepted and respected the Claimant's decision not to retire. Indeed, in consequence, as budgetarily the company could not sustain all the Account Managers, on 8th April 2016 the First Respondent dismissed Ms Elwaki on the basis as she was redundant as the Claimant was not in fact retiring **[200**].

102. The Claimant asserted that she was blamed for Ms Elwaki's departure and that the Second Defendant was furious and demanded a date by which she retire in a meeting between them on 13th April 2016. The Claimant also said that at that meeting, whilst under pressure, she told the Second Respondent that she would retire at 68 (apx April 2017) and give 6 months notice of her intention to do so. The Tribunal found that she did indicate an intention to retire at 68. Further, the Claimant's own perception may have been that she was to blame for Ms Elwaki's dismissal, particularly as she was aware of the budgetary pressures facing the Respondents, but the Tribunal did not find that she was in fact blamed for Ms Elwaki's dismissal or put under any pressure to retire or provide a retirement date. She may have been told, expressly or otherwise, of the need for the business to plan for her retirement, but the Respondents' actions did not go beyond what was permissible for legitimate business planning. Such pressure to provide a date as the Claimant asserts occurred on 13th April 2016 would be wholly at odds with the Second Respondent's e-mail (sent only a week earlier) and the Respondents' actions in dismissing Ms Elwaki. Had the Respondents intended to place the Claimant under pressure to retire at this time, the Tribunal finds they would have done so before, not after, dismissing Ms Elwaki.

103. Although she had indicated an intention to retire in April 2017, the Claimant still had misgivings about retiring. In September 2016 she spoke to Mr Negrello and asked him about the First Respondent's policy on retirement. She was told there was no policy and the First Respondent was happy for her to continue working as long as she wanted. Although the Claimant decided that she did not want to retire at 68, she did not communicate this to the Respondents. Consequently, the Respondents were unaware of the decision and continued to expect her to retire at 68 in line with the indication she had given in April 2016. As a result, in 1:1 meetings between the Claimant and Second Respondent between January 2017 and September 2017 there continued to be discussions regarding the Claimant's retirement.

104. No notes of these meetings were provided to the Tribunal. Some of these discussions may have been said to have been "without prejudice" in order to foster an open, off the record, discussion as the Second Respondent was aware that the issue of retirement was a difficult one for the Claimant. Nevertheless he still needed to understand her position in order to enable the First Respondent to undertake succession planning and ensure that when the Claimant did in fact retire that the business was prepared and there was the minimal possible business interruption and maximum continuity.

105. On 14th September 2017, Clemence Rambourg, an existing employee of the First Respondent in Marketing who wished to expand her career, was moved to a position as an Account Manager. This was because the First Respondent's business had grown and it was targeting a broader set of accounts. Ms Rambourg was given a number of active accounts, including some which were transferred from one of the other Account Managers (not the Claimant).

106. The Claimant complains that large accounts were given to Ms Rambourg despite her inexperience and that the Claimant had asked for more active accounts but was not given them. The Tribunal did not find that there was any age-related reason for the refusal to pass these accounts to the Claimant or that it was related to her anticipated retirement. The Claimant continued to concentrate her work on the PZ Cussons account, there was little development of her other accounts and informal action to encourage her to meet the Respondents' expectations continued [eg **204**].

107. At her appraisal on 4th January 2018 [**205-207**] the Claimant's objectives for 2018 were set and, as her previously indicated intention was to retire at 68 had essentially passed without her doing so, retirement was again discussed. The Claimant described this meeting as being "*very positive*" (**para 42 of her witness statement**) and the Tribunal finds that the Claimant volunteered that her plans had changed and that she now intended to retire in April 2019 (when she would be 70 years of age). No pressure was placed on her to retire at this meeting.

108. The Claimant's objectives for the year ahead recorded in the appraisal included managing a PZ Cussons pitch, landing new business, managing other accounts, agreeing future planning for retirement and handing over of accounts. No adverse comments about the Claimant's performance were recorded. The objectives set specifically covered 3 of the Claimant's accounts: PZ Cussons, Waitrose and McBride and required action on each [**205**].

109. The Claimant says that further incident occurred on 10th April 2018 in which the Second Respondent told her that her non-retirement had caused him serious embarrassment, told her he needed an immediate date and that she should "*just go*". The Tribunal found that the comments the Claimant attributes to the Second Respondent were not made and, objectively considered, no pressure was placed on her to retire. The alleged incident on 10th April 2018, despite being of a serious nature if true, was not mentioned in her subsequent grievance or referred to during her grievance interview. There was a lack of full consistency between the contents of the claim and the Claimant's witness evidence about this incident and it is inconsistent with the Claimant having already given an approximate date of April 2019 in her appraisal on 4th January 2018, which date had been accepted.

110. For similar reasons, the Tribunal was also not satisfied on the balance of probabilities that a further incident described by the Claimant in May 2018, in which the Second Respondent is alleged to have told the Claimant that she had still not retired and that her colleagues did not like working with her, in fact occurred the way the Claimant described. The Tribunal finds that there may have been further discussions about retirement between the Claimant and Second

Respondent around these times which the Claimant misinterpreted in the context of the concerns, which were beginning to be expressed more frequently, regarding her performance.

111. The Second Respondent did have difficult conversations with the Claimant around this time in respect of her performance. By this time, the concerns about the Claimant's performance had intensified, other staff were being adversely affected and more senior management was expressing concerns (**paragraph 12 of Miss Skipper's witness statement** and **paragraphs 8 to 12 of Mr Negrello's witness statement**). In particular, on 10th April 2018 a presentation to PZ Cussons had taken place and the Second Respondent and other colleagues had not felt that the Claimant had provided sufficient input either in advance of, or at that presentation and was not working sufficiently collaboratively.

112. The Second Respondent highlighted the Respondents' concerns about her lack of collaborative working and insufficient attendance at the First Respondent's offices in e-mails to the Claimant dated 9th and 10th May 2018 [**208**]. These followed an e-mail chain dating back to 19th April 2018 which demonstrated a lack of e-mail engagement with colleagues by the Claimant [**209-210**].

113. The Second Respondent's e-mails of 9th and 10th May 2018 represented an escalation in the clarity and formality of the communications between the Respondents and the Claimant regarding her performance. They referred to a lack of communication, repeated informal requests to improve, "*continual complaints over the years at your lack of presence and input on projects from both evaluation and marketing*", that "*This has been discussed many times. I have raised it directly with yourself and know that others have as well*" and that "*the job is not and never has been home based, however your actions appear counter to this which doesn't match expectations required of role*". It should have been obvious to the Claimant as a result of these e-mails that the Respondents had significant issues with her current ways of working and required her to change, to attend the office more frequently and to have more direct involvement with her colleagues and improve her communication.

114. Despite her claims to the contrary, it was apparent from the evidence she gave, the manner in which she gave it, and evidence in the bundle, that the Claimant does not take criticism, particularly criticism which she considers to be unjustified, well. Further, the Claimant was independently minded and did not like being told what to do or how to do it. She operated largely alone. She did things in her own way, the way she had always done things, and saw no need to change her methods even when the Respondents expressed dissatisfaction with them.

115. Having no concerns herself about how she was performing, she continued to undertake her work in exactly the same manner as previously. She made no adjustments to her way of working despite the feedback that she was receiving to the effect that she needed to adapt some of her ways of working in order to meet the needs of the business and other staff.

116. On about 18th July 2018 a further meeting took place between the Claimant and the Second Respondent to discuss the Claimant's retirement. The Tribunal accepted that the Second Respondent's purpose in having this conversation was to ensure that the business could plan for the future in view of the anticipated retirement of the Claimant in April 2019. There was significant disagreement between the Claimant and Second Respondent as to precisely what was said during this meeting, but it is agreed by both of them that the meeting was very short and that the Claimant said she no longer wished to retire in April 2019 at age 70.

117. The Tribunal finds that at some point this discussion was suggested or stated to be "*without prejudice*" and that the Second Respondent sought to explore what was leading to the Claimant's repeatedly offering proposed retirement dates and then changing her mind and deciding not to retire. This may have included asking what it was that would be likely to trigger her retirement plans. The Tribunal finds that the Claimant's perception of this discussion was that the Second Respondent was asking her if she was looking for a "*pay-out*" and what it would cost to get her to retire but does not find that the Second Respondent in fact suggested that she might be paid to leave.

118. The Respondents accepted and respected the Claimant decision, expressed in that meeting, not to retire or to indicate any further likely retirement date and, within 24 hours of the meeting, the Second Respondent sent the Claimant an e-mail on 19th July 2022 [**211**] which acknowledged the change in her plans and stated: "*Should this change, I would be grateful if you can let me know so that we can organise accordingly*."

119. After this time, there was no further discussion between either of the Respondents and the Claimant regarding her retirement plans or expected retirement date.

120. However, the Respondents' concerns about the Claimants performance continued to escalate. On 23rd January 2019 the Claimant had another appraisal with the Second Respondent [**212-214**]. This referred back to the 2018 objectives and noted her failure to meet the objectives regarding new business, taking the initiative and taking control. In fact, none of the objectives had been achieved (but it was fairly noted that there had been no handovers due to the Claimant having decided not to set a date for retirement).

121. New objectives were set for 2019 which included specific actions in respect of PZ Cussons, and less specific objectives including "*broaden your portfolio*" "*Plan to be put together and presented by end of March with recommendations*" and "*Demonstrate significant new business won for delivery latest next year, 2020*." Her objectives also referred to training needs.

122. The Claimant's appraisal concluded by noting that she continued to keep strong contacts at PZ Cussons but that, as in previous years, other business was lacking. It clearly stated that "*there is a strong need to demonstrate a more dynamic approach to other accounts and deliver growth in 2019 and beyond*".

Additionally, she was told that she needed more regular and programmed attendance at the Haywards Heath office "..*leading to better communication with other staff members*".

123. This appraisal, and the message clearly delivered through it, was an unambiguous and stronger message to the Claimant that the Respondents had significant issues with her current ways of working and required her to change by attending the office more frequently, improving her communication, having more direct involvement with her colleagues and broadening her portfolio rather than concentrating primarily on her major client: PZ Cussons.

124. However, the Claimant still failed to adapt her approach and problems continued through February and March 2019.

125. Some of these concerns were highlighted in particular by the events surrounding a significant presentation for PZ Cussons which took place in March 2019. Although that presentation was a huge success as far as PZ Cussons were concerned, the preparation for it was fraught with misunderstandings arising from poor communication and there was significant frustration on the part of those working with the Claimant about her poor communication, lack of collaborative working, failure to plan effectively in good time and lead the project. The Second Respondent, Ms Skipper and others had to step in at various points, particularly at the last minute, in order to pull the presentation together (**para 37 W/S Second Respondent, para 13-16 W/S Miss Skipper,** [**218-221, 814-820**]). Its success was by no means solely down to the Claimant who nevertheless sought to take full credit for it.

126. Further, by April 2019 it was apparent that the Claimant continued to undertake work primarily in relation to PZ Cussons, on which she was heavily reliant, and was failing to develop her other accounts [**223-226 & 233-235**]. Issues and concerns regarding the Claimant's communication and lack of action or progress continued through May, June and July 2019, as evidenced by a series of e-mails within the bundle [eg. **233, 236-244, 251, 253-255, 257-261, 263-267]** and by early July 2019 matters were reaching a head.

127. The Respondents' previous, repeated and escalating informal attempts to address issues with the Claimant's performance through 1:1 meetings and discussions, e-mails and appraisals had not been effective in changing her approach or improving the issues which were of concern to the Respondents. As a result, the Respondents moved to a more formal approach and the Second Respondent informed the Claimant of his intention to place her on a Performance Improvement Plan ("PIP") and his reasons for doing so [**266-267**]. Those reasons can be summarised as being: ongoing concerns regarding lack of business achieved outside of the PZ Cussons account; issues regarding communication, leadership and management; and failure to action either a price increase or a fragrance re-work on the PZ Cussons account as she was expressly requested to do. All of these matters had previously been the subject of extensive informal attempts to get the Claimant to improve (as set out above).

128. The PIP was discussed and agreed at a meeting on 25th July 2019 and the finalised PIP setting out the objectives the Claimant was required to meet was sent to the Claimant on 26th July 2019 [**277-280**].

129. The PIP objectives at that time covered a range of actions required and expected achievements both generally in terms of communication and co-ordination and across all of the Claimant's individual accounts. Requirements included organising meetings, providing daily updates to the Second Respondent as to her activity, cc'ing the Second Respondent in on all her e-mails, taking a more active and personal approach in co-ordinating her account activity, justifying or clarifying the opportunities available on some accounts and securing either a price increase or a fragrance re-work to improve margins on the PZ Cussons account. The PIP objectives were due for review on 15th October 2019, although some items, such as arranging meetings, were expected to be completed sooner.

130. The Claimant candidly accepted that at the time they were set she considered the objectives to be reasonable, that she thought that there was nothing wrong with the PIP and that she welcomed the PIP as a way of putting to bed the concerns the Second Respondent had raised. However, in light of the subsequent events she now claims that the PIP was unfair and that she was set up to fail.

131. After setting the PIP objectives, and throughout the period of the PIP, the Second Respondent prompted the Claimant regarding her objectives on a number of occasions and tried to open discussions with her regarding her progress [eg **281, 284- 287 & 289**].

132. Additionally, during the period of this PIP, the First Respondent's processes regarding expenses changed. The nature of the changes, and the need to claim expenses by the 5th of the month following the end of the month in which they were incurred together with correct receipts was communicated to the Claimant on 7th August 2019 [**375-376**]. Subsequently, a new issue arose in October 2019 regarding the Claimant's expenses, and in particular how she dealt with the expenses regarding her company car [**300-301**].

133. The PIP was not in fact reviewed on 15th October 2019 as the Claimant was off-sick during the period 7th to 20th October 2019, her fit note recording that she had "*general symptoms*" [**822**]. The Claimant attributes this period of sickness to stress and anxiety as a result of the Second Respondent's actions and the deterioration of their relationship which had started as the Second Respondent escalated steps to manage the concerns regarding the Claimant's performance.

134. On the Claimant's return to work, a meeting was arranged for 23rd October 2019 between herself and the Second Respondent. There was a misunderstanding between the Claimant and the Second Respondent as to the purpose of that meeting. The Second Respondent had been trying to arrange the PIP review and understood the meeting to be for this purpose, whereas the Claimant wanted to

discuss the stress and anxiety she felt and her working relationship with the Second Respondent.

135. In the event, the Claimant refused to discuss the PIP in this meeting and used it as opportunity to air her unhappiness with various aspects of her work and working relationship with the Second Respondent [**307-310**]. Although one complaint was that the Second Respondent was continually talking about retirement and she did not wish to retire, she accepted that the conversations had lessened and did not raise any of the specific allegations she now makes which are referred to at paragraphs 98, 109, 110 and 117 above.

136. The PIP review meeting in fact took place on 30th October 2019. Both the Claimant and the Second Respondent produced notes of the meeting [**313-316 & 344-346**]. The objectives set in July 2019 were discussed individually and it is apparent from the notes that some matters were contentious. By the end of the meeting, the Second Respondent concluded that although there had been partial progress in relation to some of the objectives, virtually none of the objectives set had been fully met, the majority had not been attempted in any significant way (even those which on the face of it required minimal effort from the Claimant) and the Claimant had offered little or no explanation as to why they had not been.

137. Despite knowing the purpose of the meeting in advance, the Claimant did not provide any written evidence (for example by way of her notebook entries) to support her assertions that she was taking steps to meet the objectives set. The level of her e-mail traffic was far lower than expected, she could not produce any documentation containing the detailed justifications that had been requested in some of the objectives, and there was simply no paper trail to support her assertions as to what she had done. None of the requested meetings had been arranged or occurred and that although she claimed to have requested some of them orally, she had inexplicably not followed up requests by e-mail when the meetings did not materialise.

138. Having reviewed the evidence, the Tribunal finds that the Second Respondent conducted a reasonable enquiry and that, on the evidence available to him at the time, the Second Respondent had reasonable grounds to believe that the Claimant had neither met any of the objectives nor taken appropriate and reasonable steps to achieve them. Further, that the Claimant's performance in relation to the PIP objectives was poor and that she was underperforming in respect of her role. Although some of the achievement objectives of the PIP may not have been capable of being reached in the timeframe since the objectives were set, the Tribunal finds that what the Second Respondent was looking for was evidence that she was working towards those objectives and had prospects of delivering them further down the track. The Claimant was in fact judged on her efforts, not on her results, and where an objective was not met through no fault of her own, this was recorded and did not contribute to the Second Respondent's conclusions [**345**].

139. Following the meeting, in light of the Second Respondent's conclusions, on 15th November 2019, the Claimant was issued with a formal final written warning

about her performance on the basis that she had not met her PIP objectives [**342**]. The e-mail was reasonable and clearly set out the future path, advising her that it was necessary to continue the PIP process and that a further set of objectives would be formulated with a further review due in mid-January 2020. She was warned that a failure on her part "…*to show clear and demonstrable improvement over this next review period could have very serious consequences, up to and including dismissal for performance failure*". The e-mail also made it clear that this was not the desired outcome but that the First Respondent merely wanted to see her underperformance reversed.

140. The Claimant did not seek to challenge this formal warning, although the Tribunal noted that the e-mail itself offered no right of appeal against the warning. The Tribunal considered this a failure of due process, albeit one which was unlikely to have made any difference overall, as evidenced by its consideration during the grievance process which occurred subsequently and is described below.

141. On 2nd December 2019, the Second Respondent provided the Claimant with a further set of updated PIP objectives, to be reviewed on 27th January 2020, noting that "..*it is imperative that you make a concerted effort to meet these objectives (which, after all, simply provide a baseline for you to meet the basic requirements of the role).*" The Claimant was again warned that failure to show sufficient improvement over this further review period would be likely to lead to further formal actions, which could include her dismissal on performance grounds [**359-362**].

142. The objectives set by this second PIP were largely the same as those set by the original PIP in July 2019 but with notable additional requirements to be available during working hours, to attend at the Haywards Heath office at a minimum every 2 weeks and at the beginning and final evaluation of fragrance projects, to record her expenses in an efficient and timely manner, and to submit her expenses within 5 days of the end of the month in which they were incurred together with receipts. The PIP objectives also noted that the Claimant was in arrears with her expenses back to August 2019 and that this needed to be corrected. It further broke down the actions required on the PZ Cussons account into a more detailed list which included the expectation that the Claimant would travel to Nigeria and/or South Africa in connection with the soap project, ensure that PZ Cussons were accompanied on a visit to Mane Indonesia when they were next in the region, and organise suitable proactive work to help support more one of their brands in relation to the emotional benefits of fragrance.

143. On the same date, a few of hours after receiving the second PIP objectives, the Claimant, with the assistance of solicitors, submitted a formal grievance in respect of the Second Respondent's conduct [**363-367**].

144. The essence of the grievance was the Second Respondent's conduct in respect of the discussions regarding retirement and that the concerns regarding her performance had been engineered in order to remove her on trumped up performance allegations or in the hope of making her life so unpleasant she was forced to resign. The grievance asserted that whilst the Claimant accepted that

her sales were down, this was to a great extent due to matters outside her control. It alleged hostile treatment and discrimination towards her on the grounds of her age. It also asserted that the Claimant had not been formally invited to any performance meetings and raised the failure to afford a right of appeal in respect of any warnings.

145. An external HR professional, Rose Gledhill, was subsequently appointed to consider the grievance [**369-370**].

146. Ms Gledhill conducted a grievance meeting with the Claimant on 6th January 2020 [**392-406**] and interviewed the Second Respondent on 8th January 2020 [**435-452**]. She also gathered documentary evidence and on 9th and 10th January 2020 she interviewed a number of the First Respondent's other employees including Ms Skipper and Mr Negrello [**454 – 458**]. She spoke to the Claimant again by telephone on 10th January 2020 [**406**] and obtained further information from the Claimant by e-mail on 14th January 2020 [**459-460**].

147. On 20th January 2020 Ms Gledhill produced her report in response to the grievance [**462-473**]. The grievance was not upheld. Ms Gledhill concluded that there had been a lack of clarity regarding the Claimant's intentions regarding retirement but that there was no evidence of age discrimination. She also concluded that the Claimant's work performance was poor and that she needed to improve, that there was evidence of frustration and loss of trust between the Claimant and Second Respondent but no evidence to support the Claimant's allegations that the Second Respondent had behaved hostilely towards the Claimant. She found the Claimant's place of work to be Haywards Heath and that not attending there regularly was detrimental to the Claimant's work performance. Ms Gledhill made a number of recommendations, which included that no further discussions should take place regarding retirement, that there should be an agreed minimum number of days in Haywards Heath per month, that the issues raised by the Claimant regarding the PIP and disciplinary process should be noted and that the Claimant should be offered assistance to resolve any future work-related anxiety.

148. The outcome of the grievance and the reasons for the decision were communicated to the Claimant by letter dated 21st January 2020 [**477-479**]. That letter noted the right to appeal within 5 working days, which the Claimant exercised by e-mail dated 27th January 2020, requesting full details of all of the Ms Gledhill's investigatory findings [**484-485**]. Some of the Claimant's complaints in the appeal were surprising and contradicted by the contemporaneous evidence. In particular: her query as to the finding that conversations around her retirement were "not unpleasant" (it was the Claimant herself who had said this [**396**]) and her suggestion that it had never been raised with her that members of the Team find her way of working frustrating (which is belied by e-mails eg [**208, 233**]).

149. On 24th January 2020, following the grievance outcome but prior to receiving the Claimant's appeal, the Second Respondent invited the Claimant to a PIP review meeting on 4th February 2020, advising her that she had the right to be

accompanied at that meeting [**487**]. Further, on 27th January 2020 the First Respondent's solicitors wrote to the Claimant's solicitors advising that the grievance had not been upheld and the PIP process would continue [**483**].

150. The Claimant responded by e-mail on 31st January 2020 indicating that she was not available on 4th February due to a client meeting and noting that she had lodged an appeal against her grievance outcome [**486**]. She expressed the view the First Respondent should not continue with any kind of performance management whilst her appeal was ongoing since the thrust of her grievance was that the PIP was contrived. She asserted that she had actioned everything requested of her and attached an update document [**488-493**] providing her response to the PIP objectives set in November 2019. She further stated: "*In view of the fact that I have actioned everything on the PIP you set, notwithstanding that I believe it was unjustified in the first place, there is absolutely no basis to continue with it in any event*."

151. Her response to the PIP objectives of November 2019 was not accompanied by any evidence of her compliance, such as e-mails, copies of documents or her own contemporaneous notes.

152. Although the Claimant claimed she had actioned everything, her response in respect of expenses was "*Expenses will be updated and meet cut-off date for January expenses and will be kept in line thereafter*". There was no indication that she had brought her expense claims up to date or submitted any expenses since the November review and she had not in fact done so as required by the objective. As at 8th January 2020, the First Respondent's finance department had received no expense claims from the Claimant since August 2019 and they were still awaiting receipts in relation to those which had been submitted [**453**].

153. Further, although the Claimant claimed to have called the Second Respondent every day, this was disputed by the Second Respondent and the call logs produced by the First Respondent do not support this assertion and show far less frequent contact [**841-862**].

154. The Claimant's response to two of the objectives was that she was "*Set up to fail*" and to another one that "*I am not sure what this means*". It is also apparent from some of her other responses that the outcomes sought by the objectives had not been achieved. Whilst some action taken was described, and explanations were given as to why the outcome had not been achieved, there was a lack of detail in the responses.

155. The Second Respondent continued to have concerns regarding the Claimant's way of working and issues regarding her performance continued to arise. He had concerns about her grasp of the complexity and regulations and her communications with the client concerning a new PZ Cussons project [**381-391**] and she had booked flights to France in January 2020 without consulting or informing him beforehand as the expense process required [**414-416**]. Further, she continued to be behind on her expenses and the Second Respondent considered that despite prompts and reminders (eg [**389**]) she was not involving

or consulting with her colleagues sufficiently in the PZ Cussons project and there were issues arising from this.

156. The PIP review meeting was held on 5th February 2020. James Glucksam accompanied the Claimant and both the Claimant and the Second Respondent produced their own notes of what occurred [Claimant: **499-505**; Second Respondent: **506 – 514**]. The Second Respondent went through each of the objectives in turn save for one regarding McBrides (which was passed over as the process it related to was still in stasis through no fault of the Claimant) and the objective that the Claimant had said she did not understand (although she had taken no steps to clarify what was required).

157. In relation to each objective the Second Respondent's concerns about the Claimant's actions or inactions were put to her and she was given an opportunity to explain what she had done and how the objective had been met. It was also put to her that her overall turnover had fallen 15% between 2017 to 2019 despite the rest of the team (excluding her) having increased turnover by 37%. Also, that the overall proportion of turnover generated from the PZ Cussons had increased from 88% in 2018 to 94% in 2019, demonstrating that she was ineffective at developing new business across her portfolio.

158. The Second Respondent was not satisfied with the Claimant's explanations and concluded that the Claimant had not fully met any of the objectives that had been discussed.

159. Having reviewed the evidence, the Tribunal finds that the Second Respondent again conducted a reasonable enquiry and that, on the evidence available to him at the time, he had reasonable grounds to believe that the Claimant had neither met any of the objectives nor taken appropriate and reasonable steps to achieve them.

160. Although the Tribunal accepted that the Claimant was working hard, it found that she was not working effectively or in line with the First Respondent's reasonable expectations. In particular, some of the easiest objectives to meet, those which the Claimant could have easily and objectively shown she had met, had not been met. The Claimant had still failed to deal with her expenses, had not attended the office a minimum of every 2 weeks and had not contacted the Second Respondent daily to report on her activity.

161. Further, the Claimant had not in fact changed her way of working at all and continued to be unable to demonstrate that she had a reasonable pipeline of work or was likely to develop such a pipeline in the foreseeable future. She continued to communicate mainly orally so there remained a lack of evidence of her work trail and what she claimed had been done. This lack of traceability also re-enforced her failure to work effectively within a team, which all parties agreed was a necessity for success in the Claimant's role, as it did not permit knowledge to be shared amongst her team in an efficient or recordable manner. The Claimant's responses also indicated a lack of judgment and understanding as to what her role required. She appeared to be led by her customers/clients and what

they wanted, being more concerned to keep them happy rather than proactively advance the First Respondent's position and develop new initiatives to be pitched to the customers/clients.

162. Whilst it would have been preferrable for the grievance appeal to have been concluded before the PIP review took place, the Tribunal is satisfied, on the basis on the Second Respondent's oral evidence, that although the Second Respondent concluded on 5th February 2020 that the objectives of the second PIP had not been met, he then paused the PIP process pending the outcome of the grievance appeal and no decision was taken at that time as to the consequences of that failure. Further, the Tribunal finds that no materially different conclusions would have been reached had the review been undertaken after the grievance appeal process had come to an end.

163. A further, independent HR professional, Ms Toni Trevett, was appointed to deal with the grievance appeal on about 21st February 2020 [**517**]. After making enquiries (which included contact with both the Claimant and the Second Respondent) Ms Trevett conducted an appeal hearing which took place on 13th March 2020. On 19th March 2020 Ms Trevett wrote to the Claimant, upholding the original determination of the grievance, effectively dismissing her appeal and providing her detailed reasons for doing so [**569 – 580**].

164. Following the conclusion of the grievance appeal, the Respondents focus returned to the PIP process and the Second Respondent considered how to deal with the Claimant's second failure to meet her PIP objectives. The Tribunal accepted the Second Respondent's evidence that he thought carefully about how to proceed before reaching the conclusion that there was no realistic prospect of the Claimant's performance improving and reaching the decision to terminate her employment.

165. He communicated and explained his decision to terminate the Claimant's employment immediately with payment in lieu of notice by letter to the Claimant dated 23rd March 2020 which attached his note of the PIP review hearing held on 5th February 2020 [**605-617**].

166. That letter provided the Claimant with a right to appeal to Mr Negrello, which she duly exercised on 1st April 2020 [**626**]. She subsequently expanded upon her grounds of appeal by e-mail dated 7th April 2020 [**642-645**]. Her appeal hearing took place by telephone on 6th May 2020 (the government lockdown imposed as a result of the COVID pandemic preventing a face-to-face hearing from taking place) [**664-674**].

167. Following the appeal hearing, the Claimant sent further correspondence to Mr Negrello by e-mail on 7th May 2020 [**675-680**]. Mr Negrello carefully considered the appeal and on 15th May 2020 wrote to the Claimant rejecting her appeal, upholding the dismissal and providing his detailed response to the points that she raised on the appeal [**681-692**].

168. The Tribunal carefully considered what the reason for the dismissal was and finds that the Claimant was dismissed solely on the basis of her performance and capability to perform the work required of her. This is a potentially fair reason for dismissal within s.98 ERA. Although the Claimant asserted that that whole PIP process and alleged performance issues were a sham engineered to remove her from the business as she had refused to retire, the Tribunal did not find that to be the case. The Tribunal is satisfied that there were genuine concerns about the Claimant's performance, which had persisted for a lengthy period of time despite less formal attempts to address them and that the Claimant's age was not a material factor in either the performance management steps taken by the Respondent or the decision to dismiss the Claimant.

169. The Respondents may have temporarily held off on taking formal action to performance manage the Claimant for a short period when she was expected to retire imminently so as to avoid any unpleasantness for the Claimant. However, by the time it was clear that she was not intending to retire in the foreseeable future, the Claimant's performance issues and declining sales figures could no longer be overlooked. By July 2019 all informal attempts to encourage and support her to improve had been unsuccessful and the Respondents had reached the point where there were no other reasonable options available to them but to embark on a formal PIP. This was particularly the case as the Claimant appeared to be unable to recognise the deficiencies in her performance or adapt her ways of working.

170. The Tribunal also finds that the First Respondent acted fairly in dismissing the Claimant for capability as its decision to dismiss was within the range of reasonable responses taking into account all of the circumstances set out above and including the size and administrative resources of the First Respondent.

171. The Tribunal concluded that the First Respondent followed a reasonably fair procedure. The Claimant's grievance was determined before the decision to dismiss was taken and the First Respondent had notified the Claimant of the deficiencies in her performance and what she was required to do to improve and had given her a fair chance to do so. The Claimant did not consider the objectives to be unreasonable at the start of the process and the Tribunal did not accept that the objectives were in fact unreasonable. The majority of the PIP objectives remained the same from July 2019 to the review, over 6 months later, on 5th February 2020 but there had been no discernible improvements and the Claimant had failed to meet even the simplest objectives in full.

172. Although the Tribunal had concerns that the second PIP period was effectively only some 7 weeks (taking into account the Christmas period) and would not have been sufficient for her to achieve all of the objectives, in particular those which required new business to be delivered, the Tribunal finds that the period was long enough for her to demonstrate that she had taken material steps towards those objectives. Further, the time period was sufficient for her to address her expenses, improve her attendance in the office, and to improve her communication and generate documentary evidence of her actions.

173. The Tribunal also finds that the decision to dismiss was not based upon her failure to meet all of the objectives or to increase sales, but on her failure to take, and/or to demonstrate that she had taken, material steps that might subsequently lead to her meeting the objectives and increasing sales further down the line. Also, her failure to comply with the clearly stated basic requirements of the First Respondent in relation to attendance at the office, communication, team-work and expenses.

174. The First Respondent reached genuine and reasonable conclusions that the Claimant had not merely failed to achieve the vast bulk of the objectives set for her, she had failed to demonstrate that she had taken appropriate and reasonable steps to achieve them, or provide any good reason for her failure. It had reasonable grounds to believe not merely that she was performing below expectations but also that there was little prospect of improvement in the foreseeable future and that the Claimant was resistant to change.

175. The Tribunal found nothing wrong with the appeal process adopted by the First Respondent in respect of the dismissal. Based on the evidence available to Mr Negrello and the Tribunal, the Tribunal finds that his decision to reject the appeal and uphold the dismissal was also objectively within the range of reasonable responses.

176. So far as the claim of age discrimination is concerned, for the reasons set out above, the Tribunal makes the following findings.

177. Discussions took place between the Claimant and the Second Respondent, on behalf of the First Respondent, regarding the Claimant's retirement. The majority of those discussions were unlikely to have taken place with someone who was not in the over 65 age group which the Claimant identified with. The reason for the discussions was the need for the First Respondent to plan for the Claimant's succession in order to avoid a risk of significant business interruption.

178. The Tribunal considered all of the circumstances, including not merely each incident separately but the cumulative effect of the facts found, but concludes that these retirement discussions did not amount to less favourable treatment of the Claimant. The discussions were a genuine attempt by the Second Respondent to ascertain the Claimant's retirement plans for the legitimate purpose of succession/work force planning. The Claimant herself acknowledged that she did not consider the discussions unpleasant at the time and it is only subsequently that they have taken on a greater significance.

179. If the Tribunal is wrong in concluding that the discussions did not amount to less favourable treatment of the Claimant on grounds of age, it finds that the discussions were a proportionate means of achieving a legitimate aim and did not therefore amount to discrimination as a result of s13(2) EA 2010.

180. Further, as set out above, the Claimant's age had no significant influence on the performance management of the Claimant under a PIP, and her subsequent dismissal on grounds of capability and the Tribunal finds that the First

Respondent would have taken the same action in respect of anyone who was underperforming in the same respect as the Claimant. These matters therefore also do not amount to less favourable treatment of the Claimant on grounds of age and were not discriminatory.

181. In light of the above findings, it is not necessary for the Tribunal to consider whether the Claimant brought her claims for discrimination in time. However, the Tribunal notes that, had it been required to consider this matter, it would have found that all the retirement discussions amounted to conduct extending over a period and that the last act in that series took place on 18th July 2018.

182. If the Tribunal is wrong that the performance management and dismissal matters were not related to the Claimant's age it would have found that there was too great a time gap between the end of the retirement discussion in July 2018 and the start of the PIP process in 2019 for these matters to form part of a continuing series of events amounting to continuing discrimination.

183. The retirement discussions claims would therefore have been out of time and the Tribunal would not have found it just and equitable to extend time in the circumstances of this case. There was a lengthy delay after the discussions ceased before the Claimant commenced her claim on 17th July 2020, no reason for the delay was given and the Claimant could not be said to have acted promptly, particularly as the Claimant had the benefit of advice and assistance from solicitors by December 2019 at the latest. The Claimant has not established to the Tribunal's satisfaction any basis on which it would be just and equitable for an extension to be granted.

Conclusions

184. For the reasons set out above, The Tribunal find that the Claimant was not unfairly dismissed and was not treated less favourably by the Respondent than others because of her age.

185. The Claimant's claims of unfair dismissal and direct age discrimination are not therefore well-founded and will be dismissed.

Employment Judge Clarke
Date: 13th February 2023